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No. 87-1412

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SUSAN E. DAVIDSON,
Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Appellee.

Appeal From The Supreme Court of Illinois

BRIEF OPPOSING MOTION TO DISMISS

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1. In its Motion to Dismiss, the State of Illinois does not address the constitutionality of Illinois Supreme Court Rule 604(a)(1), which permits the prosecution on its own motion and over defense objection and without judicial determination to declare a mistrial and take mid-trial appeals of certain evidentiary rulings, and then later re-try the defendant for the same offense. Defendant maintains that this rule is repugnant to the double jeopardy clause of the *United States Constitution*. The state's failute to specifically address the constitutionality of the rule illustrates its indefensibility.

2. Instead of defending the constitutionality of the Illinois rule permitting state-generated mistrials and mid-trial appeals, the state has instead based its motion to dismiss on general

allegations that this issue has already been decided, or that the mistrial declared by the state was in effect caused by defendant's misconduct. Defendant respectfully disagrees, and disputes these assertions.

3. The state's arguments are not separately numbered, and are all contained at pages 1-7 of its Motion to Dismiss under the heading "This Court Has Already Correctly Ruled Appellant's Double Jeopardy Claim To Be Meritless". Defendant will deal separately with the points raised thereunder by the state. The titles of the following paragraphs are defendant's characterizations of the state's arguments with page designations to the state's Motion to Dismiss.

A. The state argues that dismissal of defendant's previous interlocutory appeal for want of substantial question disposes of her double jeopardy claim. (p. 2)

To the contrary, the appeal dismissed October 1, 1984, by this court was interlocutory. Since then, the defendant has been put to a second trial, convicted and sentenced to 30 years in prison. The court's previous dismissal was summary, and the grounds for it were not announced. This court has never specifically addressed the question raised here nor has the issue been examined after full briefing. In any event, this court's previous summary dismissal does not bar the court from full consideration of the issue.

B. The state argues that defendant bases her objection to the Illinois rule on its potential harm to others rather than actual harm to defendant. (pp. 2-3)

In fact, the rule complained of has permitted a second trial of defendant herself on the same charge, a conviction, and a 30-year sentence, and it is precisely this of which defendant complains.

C. The state argues that defendant was obliged to object to handwriting exemplars before trial. (pp. 3-4)

This argument is not accurate, in no way justifies a second trial of defendant on the same charge, and is essentially irrelevant to the issue of double jeopardy.

D. The state argues that defendant's conduct amounted to a consent to the mistrial. (pp. 5-6)

In fact, defendant repeatedly objected to the mistrial. The fact that the state declared a mistrial after the defendant's objection to evidence was allowed can in no way be interpreted as a consent by defendant to the mistrial.

Defendant's refusal to concur in the state's suggestion that the first trial be recessed for several days to obtain new exemplars is irrelevant, particularly where the state never even suggested such a recess to the court or moved the court for a recess. The state could have proved the handwriting by lay testimony, could have obtained new exemplars while the trial proceeded or could have used other available handwriting standards from the defendant. Instead, the state chose to invoke the Illinois rule complained of, declare a mistrial, and later re-try the defendant. Defendant did not in any sense retain control over the course to be followed.

E. The state argues that the mistrial was the result of "manifest necessity", removing the double jeopardy problem. (pp. 6-7)

The Illinois rule permits the prosecutor alone to determine the necessity of a mistrial. The judge has no discretion, nor was any sought or exercised. The so-called "manifest necessity" of mistrial under the Illinois rule complained of is the state's self-defined "need" to use evidence to which the court allows an objection. This definition of "manifest necessity" has never before been used to justify two trials of defendant for the same

offense, especially where, as here, alternatives were available to the state which would have made mistrial unnecessary.

The report of proceedings in this case will show that the prosecuting attorney "needed" a mistrial after he had been upbraided by the trial judge for misrepresenting to the court the underlying reasons for selecting the particular exemplars in dispute. He chose to mistry the case immediately after this dispute with the judge rather than proceed before the same judge and jury. A full briefing of the issue before this court will reveal not only an intrinsically unconstitutional rule permitting mid-trial appeals, but also a particularly unfortunate example of the invoking of that rule.

CONCLUSION

The unique Illinois Supreme Court rule permitting the state to take mid-trial appeals of evidentiary rulings, followed by a second trial of the defendant for the same offense, has not been justified or supported by the state's Motion to Dismiss, and is repugnant to the double jeopardy clause of the *United States Constitution*. A full exploration of both the facts of the case and the laws will adequately demonstrate the unconstitutionality of the rule.

Respectfully submitted,

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